DIVISION ONE
FILED: 4/23/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0357
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
RICHARD JAMES KIRTLEY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-180683-001

The Honorable Cari A. Harrison, Judge
The Honorable Samuel A. Thumma, Judge
The Honorable Sally S. Duncan, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

Richard James Kirtley — Yuma
Appellant

W I N T H R O P, Chief Judge

¶1 Richard James Kirtley ("Appellant") appeals his convictions and sentences for possession of narcotic drugs (crack cocaine) for sale, use of dangerous drugs (methamphetamine), use of marijuana, and possession of drug paraphernalia. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). This court granted Appellant the opportunity to file a supplemental brief *in propria persona*, and he has done so, raising numerous issues. He has also raised several issues through counsel that we address.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013),[1] 13-4031, and 13-4033(A). Finding no reversible error, we affirm.

---

[1] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have occurred since the relevant date.

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On January 6, 2009, a grand jury issued an indictment, charging Appellant with Count I, possession of a narcotic drug (cocaine) for sale, a class two felony, in violation of A.R.S. § 13-3408(A)(2); Count II, possession or use of a dangerous drug (methamphetamine), a class four felony, in violation of A.R.S. § 13-3407(A)(1); Count III, possession or use of marijuana, a class six felony, in violation of A.R.S. § 13-3405(A)(1); and Count IV, possession of drug paraphernalia, a class six felony, in violation of A.R.S. § 13-3415(A). The trial court (the Honorable Sally S. Duncan) later granted the State's motion to amend Count I of the indictment to clarify that the alleged cocaine was actually cocaine base or hydrolyzed (crack) cocaine.[3]

¶4 Before trial, the State alleged that Appellant had six historical prior felony convictions. The State further alleged

---

[2] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

[3] The court (Judge Duncan) also granted Appellant's "Motion to Strike Duplicitous Language from the Indictment," after concluding that Counts II and III were duplicitous because each alleged both possession and use in the same count, and the court concluded that possession and use were two different offenses rather than means of committing the same offense. The court therefore ordered the State to pick a theory of prosecution for each count, and the State chose to prosecute both counts under the "use" theory. Because the issue has not been raised, we do not comment on the propriety of the court's ruling. *See generally State v. Paredes-Solano*, 223 Ariz. 284, 287-92, ¶¶ 4-22, 222 P.3d 900, 903-08 (App. 2009).

that Appellant was not eligible for probation pursuant to A.R.S. § 13-901.01 because he had more than two prior drug convictions.

¶5 The record indicates that Appellant rejected multiple plea offers before trial. The State extended a plea offer with the terms that Appellant plead guilty to Count II, possession of dangerous drugs, with one prior felony conviction, and stipulate to a term of imprisonment not to exceed five years' incarceration in the Arizona Department of Corrections ("ADOC"), with a $1,000 drug fine. In exchange, the State agreed in part to dismiss Counts I, III, and IV, and not allege any remaining prior felony convictions. Appellant initially declined the State's offer and indicated he was unwilling to discuss further settlement. Later, however, he accepted the State's plea offer, and he, defense counsel, and the prosecutor signed the plea agreement. Before the trial court had accepted and entered the agreement, however, Appellant moved to withdraw from the agreement, and the court granted his motion. Appellant later rejected a revised plea offer that would have guaranteed his placement on supervised probation.

¶6 At trial, the State presented the following evidence: At approximately 1:00 a.m. on December 28, 2008, a concerned citizen called emergency dispatch (911) after driving past a silver Mercury Sable parked partially in the street at a diagonal angle with its turn signal flashing. A man, later

identified as Appellant, was slumped to the side of the driver's seat and appeared to be "passed out" or in need of assistance. At the request of the emergency dispatch operator, the citizen turned around and returned to the vehicle to relay its make, model, and license plate number. When the citizen returned, he noticed the vehicle's turn signal had stopped blinking, the headlights had been turned on, and Appellant had changed positions inside the vehicle.

¶7 Officers Murphy and Sund of the Phoenix Police Department soon arrived to conduct a welfare check, and they made contact with Appellant. Despite it being cold outside, Appellant was sweating profusely, his eyes were bloodshot and watery, he had trouble concentrating, and he was generally unresponsive. Given the symptoms Appellant was exhibiting, the officers concluded Appellant was impaired, and they arrested him.

¶8 The officers also decided to tow the Mercury Sable; consequently, they sought to conduct an inventory search of the vehicle's contents. A drug-detection dog was summoned and initially conducted a cursory search of the vehicle, but the dog did not alert for drugs. At trial, the dog's handler (Officer Zienlinski) testified that in order to give positive reinforcement to a dog even when it does not find drugs, a drug-scented cotton ball is often placed in the vehicle for the dog

to find so the dog can be rewarded. When Officer Zienlinski placed such a cotton ball in the center console of Appellant's vehicle, the dog alerted to its presence. As she went to retrieve the cotton ball and continue her own search, Officer Zienlinski noticed plastic baggies in the center console containing substances later determined to be 860 milligrams of methamphetamine and twenty-five grams of cocaine base. Officers also found a silver and blue pipe under the baggies in the center console. In the back seat of the vehicle, police officers found a pill bottle containing 300 milligrams of marijuana inside a canvas bag. Officer Sund, who is a controlled substance officer, took custody of the drugs and later placed them in an impound locker at the police station. A urine sample collected from Appellant later that morning tested positive for cocaine, methamphetamine, and marijuana.

¶9 Appellant chose not to testify at trial. The jury found Appellant guilty as charged on all counts and, with respect to Count I, found that Appellant possessed at least 750 milligrams of cocaine base or crack cocaine.

¶10 Before sentencing, Appellant stipulated to the existence of five prior felony convictions.[4] The trial court

[4] The trial court found that Appellant had five historical prior felony convictions. At sentencing, however, the court stated that it was only considering four prior felony convictions for sentencing purposes.

sentenced Appellant to concurrent, partially mitigated terms of 12 years' imprisonment in ADOC for Count I, 7 years' imprisonment for Count II, and 2.5 years' imprisonment each for Counts III and IV. The court also credited Appellant for 121 days of presentence incarceration. Appellant filed a notice of appeal.[5]

II. ANALYSIS

A. Grand Jury Testimony

¶11 Appellant seeks to challenge the grand jury's finding of probable cause. Specifically, he maintains the State failed to present evidence to the grand jury in a fair and impartial manner because the State's witness, Officer Murphy (who subsequently died before trial), gave "misleading" testimony.

¶12 Challenges to a grand jury's finding of probable cause are not reviewable on appeal and must be brought by motion followed by special action, except in cases of perjured, material testimony. *See State v. Moody*, 208 Ariz. 424, 439–40,

[5] The trial court entered judgment and sentenced Appellant on April 20, 2011, and Appellant filed his notice of appeal twenty-six days later, on May 16, 2011. To be timely, a notice of appeal must be filed within twenty days after the entry of judgment and sentence. Ariz. R. Crim. P. 31.3. Because Appellant's notice of appeal was not timely filed, this court stayed the appeal and revested jurisdiction in the trial court to permit Appellant to petition that court for permission to file a delayed appeal pursuant to Rule 32.1(f), Ariz. R. Crim. P. The trial court granted Appellant's request for a delayed appeal, and Appellant's appeal was automatically reinstated in this court pursuant to this court's prior order.

¶ 31, 94 P.3d 1119, 1134–35 (2004). As relevant here, a witness commits perjury by making "[a] false sworn statement in regard to a material issue, believing it to be false." A.R.S. § 13-2702(A)(1).

¶13 Appellant does not claim that perjury occurred during the grand jury testimony, and after reviewing the entire record, including the January 6, 2009 grand jury transcript, we find no material inconsistencies between Officer Murphy's grand jury testimony and the police reports or subsequent trial testimony, much less inconsistencies coupled with any indication that Officer Murphy believed his statements were false. Accordingly, we find no error, and Appellant's challenge to the grand jury proceedings is not further reviewable.

B. Amended Indictment

¶14 Appellant also argues it was improper for the trial court to grant the State's pretrial motion to amend Count I of the indictment. The amendment clarified that the cocaine Appellant allegedly possessed for sale was actually cocaine base or hydrolyzed (crack) cocaine.

¶15 We review the trial court's decision to grant the motion to amend for an abuse of discretion. *See State v. Johnson*, 198 Ariz. 245, 247, ¶ 4, 8 P.3d 1159, 1161 (App. 2000). In general, an indictment "may be amended only to correct mistakes of fact or remedy formal or technical defects." Ariz.

R. Crim. P. 13.5(b). The original charge in Count I - that Appellant possessed cocaine for sale, when the substance was in fact cocaine base or "crack" cocaine - was simply a mistake of fact. Further, even assuming *arguendo* that the court abused its discretion in granting the motion, Appellant does not show that he was prejudiced by the amendment, and we conclude that any error would be harmless beyond a reasonable doubt. *See State v. Freeney*, 223 Ariz. 110, 116, ¶ 31, 219 P.3d 1039, 1045 (2009) (rejecting the argument that Rule 13.5(b) violations are prejudicial per se, and concluding such violations are subject to harmless error review). Accordingly, we find no abuse of discretion, much less fundamental, prejudicial error, in the trial court's decision to grant the State's motion to amend the indictment.

C. Probable Cause

¶16 Appellant also argues the trial court (the Honorable Samuel A. Thumma) erred in denying his pretrial motions to suppress all evidence seized as a result of his arrest and the subsequent search of the Mercury Sable. Appellant maintains that, at the time of his arrest, the police lacked probable cause to arrest him, and probable cause only developed after his arrest and "an illegal search of a vehicle which did not belong to [him]."

¶17 In general, we will not disturb the trial court's ruling on a motion to suppress absent an abuse of discretion. *State v. Carter*, 145 Ariz. 101, 110, 700 P.2d 488, 497 (1985).

¶18 Appellant's argument is based on the following facts: Before trial, Appellant moved to suppress all evidence seized as a result of his arrest and the subsequent vehicle search. Appellant argued he was arrested without probable cause, and the court should therefore suppress all evidence gathered as a result of the warrantless inventory search. He further argued that because the first officer on the scene, Officer Murphy, had died, the State could not use that officer's testimony to establish probable cause. The State responded in part that, even without Officer Murphy's testimony, the State could present sufficient evidence (including information provided in the 911 call and testimony from Officer Sund, the second officer to arrive on the scene) to establish that probable cause existed to arrest Appellant for DUI, and the search of the vehicle was therefore a valid inventory search. The State also responded that Appellant lacked standing to challenge the search of the Mercury Sable because he was not the vehicle's registered owner and had no reasonable expectation of privacy with regard to its contents. After holding evidentiary hearings on Appellant's motions, the trial court denied Appellant's motions to suppress.

¶19 In this case, the trial court determined probable cause existed to arrest Appellant for DUI based on testimony from one of the officers present at the scene (Officer Sund) and the circumstances presented in the 911 call. The court determined that, under the totality of the circumstances, police officers had probable cause to believe Appellant was in physical control of the vehicle in which he was found, and based on officer testimony regarding Appellant's appearance, actions, and responsiveness, probable cause existed to believe Appellant was impaired. After reviewing Appellant's motions, the State's responses, and the transcripts of the suppression hearings, we conclude that substantial evidence supported the trial court's finding of probable cause, and the court did not abuse its discretion, much less commit fundamental error, in denying Appellant's motions to suppress.

D. Sixth Amendment Rights

¶20 Appellant maintains his Sixth Amendment rights under the United States Constitution were violated because he did not have a chance to confront all of the State's witnesses against him at trial. Appellant does not specify which witness or witnesses he was unable to confront, however, and the record indicates he was afforded the opportunity to cross-examine all of the witnesses the State called at trial. Consequently, it

appears that his argument is directed at the fact that Officer Murphy was unable to testify due to his death.

¶21 The Confrontation Clause prohibits the admission of "testimonial" evidence from a declarant who does not appear at trial unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine him. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004); *accord Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").

¶22 The problem with Appellant's argument is that the State never used Officer Murphy's statements at trial. Instead, the State presented evidence solely from witnesses at trial who were subjected to cross-examination by Appellant's counsel. Consequently, we find no Confrontation Clause violation, much less fundamental, prejudicial error.

E. Inconsistencies with Officer Sund's Testimony

¶23 Appellant contends that Officer Sund committed perjury because his trial testimony differed from his police report. Appellant maintains he should be granted a new trial because the State failed to disclose Officer Sund's testimony would differ from his police report.

¶24 Appellant's argument stems from the following facts: At trial, Officer Sund testified that when he arrived, Officer

Murphy was already at the scene speaking with Appellant, and both of them were standing outside the door of the Mercury Sable. During cross-examination, Appellant's counsel attempted to impeach Officer Sund's credibility by drawing out that the officer's police report stated "Officer Murphy had [Appellant] sit on the rear" bumper of the Mercury Sable while Officer Murphy was in his patrol vehicle conducting an identification check. On re-direct examination, however, Officer Sund addressed the apparent inconsistency in the two statements by explaining that when he first arrived, he observed Appellant standing outside the door of the vehicle talking to Officer Murphy, but shortly thereafter Appellant was asked to sit on the rear of the vehicle.

¶25 We find no basis for Appellant's claim of perjury. Appellant does not explain how any difference between the officer's testimony and the police report was material, nor is there any indication that Officer Sund believed his testimony to be false. *See* A.R.S. § 13-2702(A)(1). Moreover, even if a discrepancy existed, the jury was able to hear the officer testify, consider defense counsel's impeachment of the officer, and make a credibility determination. The jury, as the finder of fact, weighs the evidence and determines the credibility of witnesses. *State v. Fimbres*, 222 Ariz. 293, 297, ¶ 4, 213 P.3d 1020, 1024 (App. 2009). In general, we defer to the jury's

assessment of a witness's credibility and the weight to be given evidence. *See id*. at 300, ¶ 21, 213 P.3d at 1027. We find no error, much less fundamental, prejudicial error in the testimony of Officer Sund.

F. Drug-Detection Dog Issues

¶26 Appellant argues the police should have created and disclosed an "incident report" regarding the performance of the drug-detection dog brought to the scene. Appellant did not request such a report before trial. Further, he does not show how such a report would be relevant, and irrelevant evidence is not admissible. Ariz. R. Evid. 402. The presence of the dog in this case bears no relevance on the ultimate discovery of the drugs found in the console of the vehicle because it was the officer handling the dog, Officer Zienlinski, who discovered the drugs while in the process of conducting the inventory search, not the dog. Consequently, any evidence related to the dog was irrelevant.

¶27 Appellant also intimates that, because of the circumstances surrounding the dog's search, the drug evidence must have been planted in his car. Appellant, however, points to nothing other than his own speculation as support, and he was free to argue this theory to the jury. After reviewing the record, we find no error, much less fundamental error, with

respect to the issues Appellant raises concerning the drug-detection dog.

G. Chain of Custody

¶28 Appellant next argues that the State failed to establish a sufficient chain of custody with respect to the drugs seized from the Mercury Sable because Officer Zienlinski could not recall whether she, Officer Murphy, or Officer Sund actually removed the drugs from the vehicle. "A party seeking to authenticate evidence based on a chain of custody 'must show continuity of possession, but it need not disprove every remote possibility of tampering.'" *State v. McCray*, 218 Ariz. 252, 256, ¶ 9, 183 P.3d 503, 507 (2008) (quoting *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996)).

¶29 In this case, Appellant points to no evidence breaking the chain of custody established by the State, and we find none. The testimony at trial indicates that Officer Zienlinski discovered the drugs in the vehicle, and the controlled substance officer (Officer Sund) immediately took possession of all of the items removed from the vehicle at the scene, and then bagged, marked, and impounded the seized items as evidence. Moreover, Officer Sund retained custody of the drugs and pipe the entire time after he gained possession of them until he placed them in the impound locker; accordingly, we find no

error, much less fundamental error, based on the chain of custody established by the State.

H. Urine Sample – Lack of Willits *Instruction/Suppression*

¶30 Appellant also argues on appeal that the trial court abused its discretion in denying his request for a *Willits* instruction because some of his urine sample spilled. If the State has lost, destroyed, or failed to preserve evidence important to a case, the trial court may instruct the jury that it may infer the evidence would have supported the defendant. *See State v. Willits*, 96 Ariz. 184, 187, 191, 393 P.2d 274, 276, 279 (1964).

¶31 Appellant's argument arises from the following facts: At trial, the State presented testimony from a drug recognition expert, Officer Bohatir, who testified in part that Appellant had provided a urine sample for testing. Officer Bohatir testified that, immediately after providing the sample, Appellant dropped the sample and a portion of it spilled. The remainder of the sample was packaged and sent to the lab for analysis.

¶32 At trial the next day, Appellant requested a *Willits* instruction with regard to his urine sample, arguing "there is some question as to whether or not that urine sample was properly collected and preserved for purposes of testing." After a brief discussion, the trial court denied his request.

¶33 We find no error in the trial court's ruling. Officer Bahatir testified that although Appellant dropped the cup holding his urine sample and "the bottom of it touched the ground," the officer caught the cup "on its way down," no part of the lip of the cup ever touched the floor, and only a minor amount splashed out of the cup and onto the officer's glove as a result of the drop. The cup did not tip over onto its side, and the officer immediately sealed the cup. Officer Bohatir's testimony supports the conclusion that the sample was not contaminated when it was dropped, and that Appellant, not the State, was responsible for the spilled portion of the sample. Further, no suggestion was made through testimony or other evidence that the defense was limited in its ability to independently test the sample. Given these facts, we conclude that the trial court did not abuse its discretion, much less commit fundamental error, in denying Appellant's request for a *Willits* instruction.

¶34 Appellant also argues that the trial court erred in failing to grant his motion to suppress the results of the urine sample because the sample was taken under duress. Even assuming *arguendo* that Appellant properly made this motion, we find no abuse of the trial court's discretion, much less fundamental error. No evidence or suggestion of coercion exists in the record, and Officer Bohatir testified that Appellant was

cooperative and "behaved like a gentleman" during testing. Consequently, we reject Appellant's claim that the trial court should have suppressed the results of his urine sample.

I. Sufficiency of the Evidence

¶35 Appellant next argues that insufficient evidence supports his convictions because no drugs were found in his possession, and the trial court erred in failing to grant his motion for judgment of acquittal based on a lack of substantial evidence. Appellant maintains he did not own the Mercury Sable, no evidence directly linked the drugs to his person, and the containers holding the drugs were apparently not tested for fingerprints.

¶36 "On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal . . . if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "We review a trial court's denial of a motion for judgment of acquittal for an abuse of discretion and will reverse only if no substantial evidence supports the conviction." *State v. Guadagni*, 218 Ariz. 1, 3, ¶ 8, 178 P.3d 473, 475 (App. 2008).

¶37 In this case, substantial evidence supports Appellant's convictions. The testimony elicited at trial (coupled with reasonable inferences derived therefrom) indicates that (1) Appellant had been in control of and had apparently

been driving the Mercury Sable immediately before his arrest, (2) Appellant appeared impaired at the time of his arrest, (3) officers found the drugs and pipe in the Mercury Sable during the immediately subsequent inventory search, (4) Appellant's urine tested positive for the same three drugs found in the Mercury Sable and for which he was charged and convicted, and (5) the amount of cocaine base or hydrolyzed cocaine Appellant possessed far exceeded the statutory "threshold amount," indicating Appellant possessed the substance for sale. *See* A.R.S. § 13-3401(36)(c). Because substantial direct and circumstantial evidence supports the verdicts, the trial court did not abuse its discretion, much less commit fundamental error, in denying Appellant's motion for judgment of acquittal.

J. Expert Opinions

¶38 Appellant also argues that "the drug expert did not adequately provide his opinion as to the issue of toxicology tests of chemical compounds and all records thereof" and "improperly provided his opinion as to the ultimate issue." We find no fundamental error.

¶39 The Arizona Rules of Evidence guide the admission of expert opinions and testimony. "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed," and "[u]nless the court orders otherwise, an expert may state an opinion – and give the reasons

for it – without first testifying to the underlying facts or data." Ariz. R. Evid. 703, 705. Additionally, in general, "[a]n opinion is not objectionable just because it embraces an ultimate issue." Ariz. R. Evid. 704(a). In a criminal case, however, "an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Ariz. R. Evid. 704(b).[6]

¶40 In addition to testimony from the concerned citizen who placed the 911 call and Officers Sund and Zienlinski, the State presented expert testimony at trial from a forensic scientist, a drug recognition expert, a toxicologist, and a drug transaction expert. Appellant does not specify as to which "drug expert" he refers, or where in the record he believes error occurred.[7]

---

[6] The language of Rules 703, 704, and 705 was amended effective January 1, 2012, to conform to the federal restyling of the evidence rules to make them more easily understood and to make style and terminology consistent throughout the rules. The changes were intended to be stylistic only, and there was no intent to change any result in any ruling on evidence admissibility.

[7] Appellant's reference to the masculine gender, however, leads us to conclude that he is likely challenging either the testimony of the drug recognition expert or the drug transaction expert.

¶41 In any case, we find no error in the court's admission of any of the expert testimony. Each expert in this case gave an extensive list of his or her qualifications, including degrees, certifications, and field experience, and each testified as to the procedures he or she followed. The forensic scientist testified as to the presence of controlled substances in the containers found in the Mercury Sable and based her conclusion on several testing procedures she used. The drug recognition expert testified that he examined Appellant for nearly two hours after Appellant was arrested, and he provided details of the testing procedures he performed on Appellant and the results of that testing.[8] At the conclusion of his testing, the drug recognition expert rendered an opinion that Appellant was at the time "under the influence of cannabis and a central nervous stimulant and was not fit to operate a vehicle safely." The toxicologist based her conclusions on testing procedures used on Appellant's urine sample, including an initial screening on an immunoassay instrument, which yielded positive results for several drugs that were later confirmed by running the urine sample through a gas chromatography mass spectrometer. The toxicologist testified that Appellant's urine contained amphetamine (a metabolite of methamphetamine), methamphetamine, THC (a metabolite of marijuana), cocaine, and benzoylecgonine (a

[8] He also obtained the urine sample from Appellant.

metabolite of cocaine). The drug transaction expert, who relied primarily on his extensive experience in the field as the basis for his opinions, testified as to the buying, selling, and usage habits of individuals involved with various drugs, including crack cocaine, methamphetamine, and marijuana.[9] Given the amount of crack cocaine in Appellant's possession and the usage rate of persons addicted to that drug, the drug transaction expert opined that Appellant likely possessed the crack cocaine for sale rather than mere personal use. After reviewing the entire record, we find nothing improper about the testimony of the State's witnesses, much less anything rising to the level of fundamental error.

K. Prosecutorial Misconduct

¶42 Appellant argues the prosecutor committed misconduct because he appealed to the passions of the jury. We disagree.

¶43 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "[I]n the closing argument excessive and emotional language is the bread and

[9] Appellant did not object to the drug transaction expert's qualifications.

butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury." *State v. Rainey*, 137 Ariz. 523, 527, 672 P.2d 188, 192 (App. 1983).

¶44 Appellant points to no specific instance in which the prosecutor allegedly committed misconduct, and after reviewing the entire record, including the prosecutor's closing and rebuttal arguments, we conclude that nothing the prosecutor said or did "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. We find no error, much less fundamental error, in the prosecutor's conduct.

L. Juror Issues

¶45 Appellant next points to two issues involving the jury panel. Appellant notes that one of the jurors who ultimately served on the jury panel raised her hand when prospective jurors were asked during jury voir dire if they would vote guilty before hearing any evidence, and he contends that he was therefore denied his Sixth Amendment right to a fair trial by an impartial jury. When viewed in context, however, the record does not support his contention.

¶46 Appellant's argument stems from the following incident: During jury voir dire, defense counsel asked the

panel of prospective jurors, “Do you think at this time [Appellant] is innocent, not guilty, guilty or you don’t know?” Defense counsel then alternately requested that prospective jurors raise a hand if they believed Appellant “is not guilty at this time,” “if right now you would think [Appellant] is guilty,” and if they were “undecided.” In response to counsel’s second query - “if right now you would think [Appellant] is guilty” - several persons apparently raised a hand, including one prospective juror (juror number 31) who ultimately sat on the jury panel. As defense counsel proceeded to ask how many prospective jurors were “undecided,” the record indicates confusion and hesitation on the part of some panel members. Defense counsel then stated that he would “start all over again,” and once again began to question the potential jurors. At that point, the trial court intervened, stating as follows:

> I will interject here for a moment because this question is asked all the time and I just want everyone to understand that no evidence has been presented and you can’t be asked to commit to a position when you haven’t heard any evidence. So I think what counsel is trying to have you understand at the end of this exercise is that, if you recall I told you that every person is innocent until proven guilty beyond a reasonable doubt.
>
> So essentially that is what we are trying to make you understand. So if you’re sitting in a courtroom and no evidence has been presented, there is a presumption that someone is innocent. Is there anyone here that doesn’t understand that?

> And, a few of you raised your hands and said that you thought he was guilty. So, if you truly have a belie[f] because somebody is sitting in a courtroom and has charges made against them that they are guilty we do need to know that. Is there anyone here with that clarification that I just gave you who believes that?

Six potential jurors answered affirmatively. However, neither juror number 31 nor any other prospective juror who was ultimately selected for the jury panel answered affirmatively. In an effort to clarify the positions of those six panel members who answered affirmatively and perhaps rehabilitate them, the court briefly questioned them, then held a bench conference with counsel outside the presence of the jury and asked if there were "any others" the court should "follow-up on" with questioning. Defense counsel answered in the negative. The court excused the entire jury panel into the hallway, struck for cause those six panel members who had answered affirmatively, and asked if any other potential jurors should be struck for cause. Defense counsel again answered in the negative, and the record indicates the remaining panel was passed for cause before counsel exercised their strikes. Juror number 31 was included in the final jury panel that found Appellant guilty.

¶47 We find no error, much less fundamental error, in the eventual inclusion of juror number 31 onto the jury and the trial court's handling of the situation. The court instructed the venire panel appropriately, determined which potential

jurors were exhibiting possible bias, and struck those persons for cause. Additionally, in its admonition to the jury, the trial court cautioned jury members to "[k]eep an open mind during the trial," and to "not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence." Moreover, in its preliminary and final instructions to the jury, the court instructed the jury that it "must follow the law" and the jury instructions, the charges were not evidence against Appellant and the jury should not think Appellant was guilty just because of a charge, the jury was required to start by presuming Appellant innocent, and the State bore the burden of proving Appellant guilty beyond a reasonable doubt. Defense counsel emphasized the import of these instructions in his closing argument to the jury. Absent evidence to the contrary, we presume the jury followed its instructions. *See State v. Manuel*, 229 Ariz. 1, 6, ¶ 24, 270 P.3d 828, 833 (2011).

¶48 Appellant next contends that an "improper conversation" occurred between defense counsel and the prosecutor because a juror was present on an elevator while the attorneys discussed the case during a break at trial. The incident was brought to the court's attention outside the presence of the jury by defense counsel, who explained that the "brief" conversation regarded only how fast the case was

proceeding. The court asked the prosecutor if he wished the court to "follow up on that," but the prosecutor declined, stating that he believed the conversation was "harmless." Given the summary of the conversation provided by defense counsel and the State's characterization of that conversation, the trial court pursued the issue no further. We find no error, much less fundamental error, with the court's handling of this issue.

M. Ineffective Assistance of Counsel

¶49 Appellant finally argues that he was provided ineffective assistance by his counsel. Because claims for ineffective assistance of counsel must be brought through Rule 32 proceedings, we do not address this argument on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

N. Other Issues

¶50 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional

and statutory rights and the Arizona Rules of Criminal Procedure.

¶51 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

III. CONCLUSION

¶52 Appellant's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
MARGARET H. DOWNIE, Presiding Judge

_____/S/_____
MAURICE PORTLEY, Judge